

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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In Re: St. Jude Medical, Inc.      File No. 01-MD-1396  
Silzone Heart Valves              (JRT/FLN)  
Products Liability Litigation

Minneapolis, Minnesota  
April 26, 2004  
1:44 P.M.

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BEFORE THE HONORABLE JOHN R. TUNHEIM  
UNITED STATES DISTRICT COURT JUDGE

(TELEPHONE CONFERENCE)

APPEARANCES

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KRISTINE MOUSSEAU, CRR-RPR  
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1 (In chambers via telephone.)

2 THE COURT: Hello, everyone. Just for the  
3 record, this is civil case number 01-1396, the in re  
4 St. Jude Medical, Incorporated, Silzone Heart Valves  
5 Products Liability Litigation.

6 Can we have counsel on the line note their  
7 appearances?

8 MR. CAPRETZ: Jim Capretz for the plaintiff.

9 MR. ANGSTREICH: Steve Angstreich for the  
10 plaintiff.

11 MR. MURPHY: Pat Murphy for the plaintiff.

12 MR. RUDD: Gordon Rudd for the plaintiff.

13 MR. KOHN: Steven Kohn for St. Jude Medical.

14 MR. STANLEY: David Stanley for St. Jude Medical.

15 MS. VAN STEENBURGH: Tracy Van Steenburgh for  
16 St. Jude Medical.

17 THE COURT: Okay. Very well. We have a couple  
18 issues to talk about. Who wishes to proceed first?

19 MR. CAPRETZ: Your Honor, if I may, this has been  
20 somewhat of my project. There are two issues we would like  
21 to address. As to a timeliness issue, the mediation  
22 process is ongoing, as the Court is well aware. Steve  
23 Angstreich has some depositions scheduled for tomorrow.

24 MR. ANGSTREICH: Mediation.

25 MR. CAPRETZ: Mediation scheduled for tomorrow,

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1 so there are a couple issues we would like the Court's  
2 guidance on and ask for an instruction. One concerns the  
3 issue of disclosure of a matrix of values.

4 There have been some discussions between St. Jude  
5 Medical and ourselves advising as to values that these  
6 patients or ranges that these patients have settled for.  
7 As Steve Kohn has suggested, in the past discussions with  
8 the Court have settled many of these claims over an  
9 extended period of time.

10 Steve's position, which he can articulate much  
11 better, nonetheless succinctly said, there is so many  
12 variables, we can't do that. The mediator has suggested  
13 through the offices of Gordon Rudd, I think Tracy is aware,  
14 that he thought it might expedite and help the parties  
15 reach more successful conclusions with these mediations.

16 When he is having discussions with St. Jude  
17 Medical, St. Jude Medical apparently refers to what they  
18 have paid in the sense of generic terms and dollar values  
19 without identifying any cases or lawyers involved. The  
20 plaintiffs have no way of knowing it.

21 It's the mediator's view, as I understand it, is  
22 that it might help actually St. Jude Medical from his  
23 perspective if we had them, that is the plaintiffs' lawyers  
24 had an idea of the range of values for the type of class of  
25 claim that is before mediation.

1           Then the possibility of reaching a successful  
2 conclusion is appropriate, and I will close my portion of  
3 the comments at this time with this remark, that as the  
4 Court is aware, a lot of these mediations have been  
5 conducted with lawyers in the back country or outback, if  
6 you will.

7           And then there were negotiations conducted with  
8 one of the more prestigious plaintiff firms, Robins Kaplan.  
9 So we're very concerned that accurate values be portrayed  
10 so plaintiffs know or have a range for what the cases are  
11 settling for.

12           THE COURT: Anyone else from the plaintiffs?

13           MR. ANGSTREICH: Jim stated our position well,  
14 Your Honor.

15           THE COURT: Okay. Mr. Kohn or Mr. --

16           MR. KOHN: Yes, Your Honor, this is Steve Kohn  
17 for St. Jude Medical. Mr. Capretz has accurately  
18 summarized our view of this, and that is that these cases  
19 are not suitable even if we were willing to provide  
20 settlement information to be put into convenient  
21 categories.

22           And while I have not personally attended any of  
23 the mediations, I have spoken to my partners who have, and  
24 by the way, I should add that out of the eleven cases  
25 mediated to date, seven of them have been settled. So the

1 track record is pretty good.

2 My understanding, and I would recommend perhaps  
3 the Court ought to talk to Mr. Carey, is that he doesn't  
4 want this kind of information, doesn't feel that he needs  
5 it. So I don't know where Mr. Capretz got his view that  
6 the mediator has asked for it, because my understanding is  
7 that he has not asked for that information.

8 And in view of the fact that we are proceeding at  
9 a pace, we have settled most of the cases that have been  
10 mediated. We think it's inappropriate for anyone to be  
11 asking St. Jude what it settled other cases for. I don't  
12 think it's helpful.

13 The cases don't lend themselves -- they are far  
14 too different from one another, and the injuries tend to be  
15 different from case to case. So for all of those reasons,  
16 we just think we ought to go forward as we had been and not  
17 have to give up this kind of information.

18 THE COURT: Let me just clarify one thing,  
19 Mr. Kohn. Are you saying that the mediator does not want  
20 St. Jude Medical to provide to him this range of values or  
21 this matrix of values?

22 MR. KOHN: That's my understanding, Your Honor,  
23 that he has not asked for it, and when there have been  
24 discussions about it, at least with attorneys representing  
25 St. Jude, he has indicated that he did not think such a

1 matrix would be helpful or beneficial.

2 MR. RUDD: Your Honor, this is Gordon Rudd. I  
3 would like to respond to that if I may because I had the  
4 direct conversation with Mr. Carey about this issue, and he  
5 in fact said that he thought it would be important that we  
6 address this issue with Your Honor because he thought that  
7 we should have case value information.

8 There may be an instance in the mediation where a  
9 plaintiff is demanding a certain amount of money, and it's  
10 my understanding that St. Jude would respond by saying, we  
11 don't pay that kind of money for that type of case.

12 And so in essence there is information being  
13 given to Mr. Carey about case values and the history of  
14 settlement that the plaintiffs don't have, and there is  
15 some thought that it would be appropriate for us to discuss  
16 this with Your Honor and to have general value ranges  
17 provided to plaintiffs. At least that was my understanding  
18 from my conversation with him.

19 THE COURT: What form does this information take?  
20 It's been described as a range of values. I assume it's  
21 dependent on particular circumstances being involved in a  
22 particular case. Give me a little bit more detail on the  
23 nature of the information that is being provided and is now  
24 being requested by the plaintiffs?

25 MS. VAN STEENBURGH: Your Honor, this is Tracy

1 Van Steenburgh. Dave Stanley, you were at the one  
2 litigation where this supposedly happened. Perhaps you can  
3 shed some light on this.

4 MR. STANLEY: Yes, Your Honor, we're not saying  
5 that -- we're not telling the mediator that, for example,  
6 in an endocarditis case the range of settlements have been  
7 from A to C. Okay. Or in a thromboembolic event case that  
8 this is what the ranges are.

9 We have not been giving the mediator any specific  
10 information along those lines. The only thing that came up  
11 in the first mediation that happened was, we told the  
12 mediator generally that, you know, these in all of the  
13 cases, okay, without regard to what type of case it was,  
14 you know, most of the settlements were, you know, in sort  
15 of, you know, five figure or six figure, that kind of thing  
16 and very general terms without saying anything about what,  
17 you know, about a matrix or the type of case or anything  
18 like that.

19 That's the only information that we -- and it was  
20 basically in response to the mediator's own assessment  
21 based upon his discussions with us and whatever of what he  
22 thought maybe these cases were going for.

23 And all we were sort of doing was kind of  
24 confirming what he had thought already, but, again, not any  
25 specifics with regard to, you know, we've settled an



1 endocarditis case for this amount, and that's the lowest  
2 amount, and the highest amount we've settled is for this  
3 amount.

4 No such specifics have been given out, nor do we  
5 think it's appropriate to give that kind of information  
6 out.

7 MR. CAPRETZ: Your Honor, this is Capretz. If  
8 the Court deems it appropriate, I would certainly think  
9 that it might be in order for the Court to have a  
10 discussion with the mediator on this privately because we  
11 have a little different view or perspective.

12 I think what we heard was that what is being used  
13 by whomever, whether it's St. Jude Medical or the insurance  
14 carriers talking, that reflection or comment might be made  
15 that we don't pay that kind of money, that the demand is in  
16 these kinds of cases, that in essence is the core of a  
17 matrix, and there is no way for plaintiffs to know that or  
18 to realize that.

19 I think it was the idea of the mediator, and I  
20 could stand to be corrected, was that if the plaintiffs had  
21 a range, in a valvular leakage case where there was a  
22 replacement of the valve, we have paid depending on the  
23 circumstances of the case from one dollar to five dollars,  
24 and that sort of thing was somewhat thought to be helpful  
25 to the plaintiffs because if the plaintiffs are going to be

1 demanding ten dollars, it's not in the ball park, and  
2 Gordon, is there anything you wanted to add to that?

3 MR. RUDD: I think you're accurately stating what  
4 my conversation was with John Carey, but I think it might  
5 help if the Court were to just speak with Mr. Carey  
6 directly because he was the one who encouraged us to speak  
7 to the Court about this very issue. So that might be the  
8 best approach.

9 THE COURT: Unless there is anything else, I'm  
10 just going to take the request under advisement. I will  
11 have a conversation with Mr. Carey and will likely after  
12 that just issue a very short single paragraph order.

13 MR. ANGSTREICH: Your Honor, this is Steve  
14 Angstreich. If for some reason after the conversation, if  
15 Your Honor should have the conversation with Mr. Carey  
16 today, if you could communicate the decision today, that  
17 would be terrific because we have our mediations tomorrow.

18 If for some reason that can't happen, then  
19 obviously we'll proceed with the mediations tomorrow the  
20 same way the others have, but if that's at all possible,  
21 that would be I think a help.

22 THE COURT: I will try to do that today if I can  
23 reach him.

24 MR. CAPRETZ: Your Honor, the other issue  
25 involves the proposed model settlement agreement, and I

1 believe the Court has a copy of a particular proposal. The  
2 MDL is concerned about the overreaching issues here as well  
3 as the fact that we're talking about a matter of public  
4 health.

5 And we have suggested to St. Jude Medical that  
6 different language might be appropriate. We have  
7 personally, our firm has settled heart valve cases not that  
8 dissimilar from those that we're talking about here  
9 since -- 1987 was the first settlement we've reached, and  
10 literally we have done hundreds of them since that  
11 particular point in time.

12 We're dealing with a major pharmaceutical  
13 corporation in most of those litigations that is probably  
14 ten times plus the size of St. Jude Medical. We're dealing  
15 with a New York national law firm, most prestigious law  
16 firm, and we use one paragraph in our agreements, and a  
17 similar paragraph has been tendered to the Court and to  
18 St. Jude Medical for consideration.

19 I will leave Steve Angstreich who has his  
20 thoughts on it to comment, but suffice it to say, I don't  
21 know if the Court had an opportunity to look at the  
22 document that was tendered, but six of the twelve pages,  
23 six of the twelve pages that were tendered deal with  
24 indemnity and confidentiality provisions.

25 If St. Jude Medical wants the plaintiffs to sign

1 such a document, then we would say and suggest that there  
2 needs to be compensation because they're requesting, they  
3 make an unreasonable request even of the lawyers who are  
4 asked to sign off on a confidentiality provision.

5 So with that, I'll let Steve supplement with his  
6 thoughts.

7 MR. ANGSTREICH: Your Honor, the only thing I  
8 would like to direct you to is the indemnification  
9 provision. Obviously St. Jude Medical is entitled to be  
10 indemnified with respect to liens that may exist so that  
11 nobody comes knocking on their door for reimbursement.

12 But with respect to the other provision as to  
13 indemnification, there is no reason why a plaintiff needs  
14 to provide such indemnification, and I agree with what Jim  
15 has said. This is overkill in the way of confidentiality,  
16 and it's just something, by the way, that we even can't  
17 live with because we're wearing multiple hats when we're  
18 involved in these settlements.

19 And it becomes extremely difficult where we can't  
20 use any of the information that is gathered or any -- with  
21 respect to the settlements or with respect to the documents  
22 or the issues of liability in any other case. I don't know  
23 how we would even be able to do that, but I think that  
24 Jim's paragraph, that one paragraph is more than  
25 sufficient.

1 That's all I have to say.

2 THE COURT: Anyone else for the plaintiffs?

3 Okay. For the defendants?

4 MR. KOHN: Yes, Your Honor, this is Steve Kohn  
5 for St. Jude. First let me say that Mr. Capretz provided  
6 us with his proposed paragraph I believe at the close of  
7 business on Thursday of last week.

8 I have not had the opportunity to study it  
9 carefully or review it with our client or with the  
10 insurance carriers, but having said that, I'll say that the  
11 provision that they find so onerous with respect to  
12 confidentiality has been used with a number of other law  
13 firms in this litigation, and they found it acceptable and  
14 appropriate.

15 I know that it's been used in other, for lack of  
16 a better word, mass tort litigations. I am having a little  
17 trouble understanding why they find keeping a settlement  
18 confidential is such a problem, and this is generally a  
19 matter of contract and negotiation between the parties.

20 They have not provided us with any reason when  
21 they gave us their language that the provision that we have  
22 been using for several years is somehow violative of public  
23 policy or runs afoul of any case law.

24 They simply said, we don't like it, and here is  
25 what we would entertain. That's not acceptable to us. I

1 think it would be a lot more appropriate if they could  
2 point out any violations of public policy or the case law  
3 that any particular part of our confidentiality agreement  
4 violates.

5 I'm not aware of any, and if they could point  
6 that out, it might be helpful. As to the indemnity, I'm  
7 not sure what Mr. Angstreich is referring to. Generally  
8 again, this is generally a matter of negotiations between  
9 the parties, and it may be something we can work out. It  
10 may not.

11 He hasn't -- no one has communicated to us what  
12 alternative indemnity provisions might be suitable to them.  
13 So I think that is something that there hasn't been any  
14 meet and confer on up to this point.

15 So at this juncture, I don't really see that it's  
16 appropriate for the Court to be involved in this unless and  
17 until the parties can't work it out together.

18 MR. ANGSTREICH: I'm sorry, Steve.

19 MR. KOHN: And that hasn't happened yet.

20 MR. ANGSTREICH: Your Honor, this is Steve  
21 Angstreich. I really am at a loss to understand. We got  
22 an agreement. I sent a message to Mr. Kohn, and I said we  
23 will not agree to the indemnification provision. It is  
24 overbroad. We will not provide it, and no response from  
25 him.

1       It's a very simple thing. There is an  
2   indemnification subparagraph I that requires us to  
3   indemnify St. Jude against any and all other claims, and  
4   there is a second paragraph that is, agree to indemnify as  
5   to liens and encumbrances. Liens and encumbrances we have  
6   no problem with. Any and all other claims we will not  
7   agree to.

8       I guess the issue is, and it's unfortunate that  
9   Your Honor is involved in this, that if we get to a point  
10   of settling a case tomorrow, there will be no settlement if  
11   the required language is that subparagraph I. With due  
12   respect to Steve Kohn, I don't have to show Steve Kohn  
13   public policy statements.

14       My clients will not indemnify St. Jude, nor do  
15   they have to indemnify them except as to liens and  
16   encumbrances. With respect to the confidentiality  
17   provision, it is possible that these other plaintiffs never  
18   had another case once they settled all their cases, but we  
19   are MDL attorneys, and we are involved in not only the MDL  
20   case but other cases that may or may not settle.

21       The confidentiality requires us to effectively  
22   keep confidential any of the information asserted with  
23   respect to this client's case, causation, liability,  
24   damages, negotiation processes. I don't know how we can do  
25   that, how we shut down the particular side of our brain to

1 deal with the next case, and potentially we could be  
2 violating that confidentiality provision, and to be frank  
3 about it, simply because others have done it doesn't mean  
4 that we need to do it.

5 The protection as to confidential nature of the  
6 settlement is provided in the paragraph that Jim has given.  
7 The rest is overkill. I don't even know if the clients  
8 will understand it, how they can live with it or how we as  
9 attorneys can live with it, and I do apologize to Your  
10 Honor because generally speaking this isn't an issue for a  
11 court.

12 MR. CAPRETZ: And if I may, Your Honor, I was  
13 saying, notwithstanding the correctness of Steve's comment  
14 about the issue to the Court, these mediations are being  
15 conducted under the rubric of the Court.

16 We suggest that it is germane for the Court to  
17 look at these issues, and just to highlight one of the  
18 points, one of the paragraphs to tell us about the  
19 overreaching aspect is that there is a waiver of any  
20 possibility of challenging the validity of the provisions  
21 of the confidentiality agreement. I mean, talk about  
22 overbroad, this is one example of that.

23 And, Steve, a respectful colleague across the  
24 table suggests law. I'm going to offer a very simple form  
25 of some law. One is the State of Minnesota versus Phillip



1 Morris, which was a 2000 appellate court decision where the  
2 Court found that it would not keep or it would not prevent  
3 from disclosure certain discovery that was conducted in  
4 that case involving the tobacco litigation.

5 And the Court used some very articulate wording  
6 about access to the information which was in the public  
7 interest in light of the public health interest involved.

8 I would also suggest counsel may want to look at  
9 the U. S. District Court rules for South Carolina which  
10 were adopted in November of 2002 where the Court expressly  
11 says, and this goes for any of the courts within that  
12 particular district, that settlement agreements shall not  
13 be sealed pursuant to the terms of this rule.

14 And finally, the state of Florida in 1991 passed  
15 what is known as the Sunshine Act, and the courts of  
16 Florida, Section I think it's 69.08.1 subparagraph 3. It  
17 was basically, protects the public from information which  
18 it needs or could use for its own public health reasons.

19 So there is some very, very compelling reasons,  
20 we believe, for the Court to consider prohibiting or  
21 avoiding or asking St. Jude Medical to revisit this  
22 overreaching, overbroad provision and the provisions that  
23 are all incorporated within the confidentiality provision  
24 itself.

25 So it's with that in mind that we ask the Court

1 to please look at this and suggest whether or not we might  
2 be able to find a way to compromise.

3 THE COURT: Anything else, Mr. Kohn?

4 MR. KOHN: Well, I would only say, I'm hearing  
5 some law cited for the first time, which are obviously  
6 cases I have not read for a while, if at all. It sounds to  
7 me like they're probably not appropriate or even on point.

8 If this is an issue the plaintiffs want the Court  
9 to be involved with if the Court is so inclined, I think  
10 they ought to brief their position and provide us with an  
11 opportunity to respond because we think the agreement we  
12 have been using is appropriate, and if it isn't, then we  
13 should modify it.

14 But I have not heard anything up to this point  
15 that suggests that there is anything inappropriate about  
16 the confidentiality provision. I'm happy to look at the  
17 cases that Mr. Capretz is pointing out now for the first  
18 time, but I suspect our position is not going to change.

19 MR. ANGSTREICH: Your Honor, this is Steve  
20 Angstreich. I appreciate Steve's position. Our position  
21 isn't going to change. So I guess what that means is that  
22 there can't be any settlements because we cannot sign on  
23 behalf of our client documents that contain an overbroad  
24 and improper provision in our view.

25 And to tell us that we have to brief it is to say

1 you're going to accept this or we're not going to settle  
2 the case with you, and we're telling them straight out that  
3 there is an overreach here. So I don't see any reason why  
4 we have to brief this matter in light of the paragraphs  
5 that are in front of Your Honor.

6 If Your Honor believes that they're appropriate,  
7 then Your Honor will tell us what Your Honor thinks we  
8 ought to do or leave it to the parties to see how they get  
9 this resolved.

10 I have been settling cases for 34 years. I've  
11 never had a party tell me that it's this way or there will  
12 be no settlement, especially over a provision of  
13 confidentiality when there is basic language that says we  
14 agree to keep it confidential.

15 MR. KOHN: Well, I am not saying that it's this  
16 way or we're not going to settle cases. What I'm saying  
17 is, the plaintiffs have not provided us with a reason --

18 MR. ANGSTREICH: Yes, we did.

19 MR. KOHN: -- based on the law that there is  
20 anything that this language does that is violative of  
21 public policy. You may not like it. You may want to  
22 broadcast the settlement amounts all over the country.  
23 That may be what you want to do, but the fact of the matter  
24 is, as far as I know, as I sit here now, this agreement of  
25 ours is consistent with the law. If it isn't, then we'll

1 change it.

2 MR. ANGSTREICH: Steve, please, with due respect,  
3 it is not consistent with the law as we view it and our  
4 rights. We don't intend to broadcast the numbers. The  
5 paragraph that Jim wrote protects the integrity of the  
6 numbers from disclosure.

7 Your language is impossible to live with, gives  
8 you avenues of litigation against counsel and plaintiffs,  
9 is totally inappropriate, and I don't have to -- I don't  
10 have to convince you as to the law. It's just not the way  
11 things are done.

12 I don't see what is wrong with the language that  
13 we've offered you, but effectively you're telling me I have  
14 to convince you that your language is illegal, and I really  
15 don't think that that's how things get done, but enough  
16 said.

17 MR. CAPRETZ: I was just citing one of the  
18 paragraphs on page 7 of 12 that the parties are asked to  
19 keep confidential just the specific facts, events or  
20 circumstances giving rise to claimant's claims against  
21 St. Jude Medical including but not limited to any  
22 commentary, statements or opinions suggesting or concluding  
23 that there was or is, I, a defective St. Jude Medical  
24 Silzone valve; II, any wrongful conduct by St. Jude Medical  
25 in designing, testing, marketing, recalling and seeking

1 regulatory approval for the SJM Silzone valve and/or  
2 appliance with post market governmental regulations or --  
3 and this is another one of the doozies, and they've got a  
4 lot of these -- any other wrongdoing by St. Jude Medical,  
5 whatever that means.

6 Claimants further agree not to communicate,  
7 publish or cause to be published in any public or business  
8 forum or context any statement whether written or oral that  
9 would disparage St. Jude Medical.

10 Now I'll leave it up to the Court's imagination  
11 as to what theoretically St. Jude Medical would have in the  
12 way of a claim against the claimant or claimant's counsel,  
13 and we offer to the Court that's a clear violation of the  
14 necessity to make certain public health interests known and  
15 available to the public.

16 And, Steve, just one thing. That one case that  
17 we did cite, the U. S. District Court of South Carolina and  
18 the Sunshine Act in Florida, but the State of Minnesota  
19 case, 2000 case 606 NW.2d 676.

20 THE COURT: Well, this is what I'm going to do  
21 today. Generally speaking, I'm not highly supportive of  
22 confidentiality provisions in settlement agreements, and  
23 I've also reviewed the District of South Carolina local  
24 rule and actually find it quite attractive, but we don't  
25 have that rule here, and I do recognize that parties have

1 some room to negotiate on these points because they really  
2 are negotiating a contract.

3 Having said that, this is my suggestion to the  
4 parties. I suggest that you meet and confer on this issue  
5 with the following comments: As to the confidentiality  
6 provisions, overall, I don't see anything particularly  
7 problematic except I think there probably needs to be some  
8 scaling back to recognize the role of plaintiffs' lawyers  
9 in this multi district litigation.

10 And I think there has to be some recognition of  
11 that and the fact that that will likely play into the  
12 ability to at least consider this information in one's  
13 mind. I don't think it has anything to do with public  
14 disclosure, but it's awfully difficult to draw lines within  
15 the human mind.

16 On the other hand, the indemnification provision,  
17 as to the liens, that's certainly fine. As to the  
18 remainder of it, I think that probably needs to be removed  
19 or significantly limited. I'm not prepared right now to  
20 have any view as to how it should be limited, but I think  
21 that's a subject that the parties can discuss.

22 I do find the broad statement of indemnification  
23 that's in there right now to be problematic. So I would  
24 ask the parties, maybe you can designate someone from each  
25 side to further discuss this matter, and if we need to, we

1 can return to it the next time we meet.

2 MR. ANGSTREICH: Very good. Thank you very much,  
3 Your Honor.

4 THE COURT: Thank you. Anything else for today?

5 MR. ANGSTREICH: No.

6 MR. KOHN: No.

7 THE COURT: Okay. We'll be in recess. Thank  
8 you.

9 \* \* \*

10 I, Kristine Mousseau, certify that the foregoing  
11 is a correct transcript from the record of proceedings in  
12 the above-entitled matter.

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16 Certified by:  
17 Kristine Mousseau, CRR-RPR

18 Dated: May 2, 2004

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